BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH RAINS	)	
Claimant	)	
	)	
VS.	)	
	)	
PMA (PREFERRED MEDICAL ASSOC.)	)	
Respondent	)	Docket No. 1,004,295
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE and	)	
ROYAL & SUNALLIANCE INS. CO.	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carrier, Liberty Mutual Insurance Company requested review of the February 9, 2006 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on June 6, 2006.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent and its insurance carrier Liberty Mutual. Joseph McMillan, of Lenexa, Kansas, appeared for respondent and its insurance carrier Royal & Sunalliance.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that the evidence contained within the record establishes that claimant is permanently and totally disabled. And the parties also agreed that this claim has been pled and tried exclusively as one involving an accidental injury arising out of and in the course of her employment with respondent. Lastly, for purposes

of determining the timeliness of claimant's claim, the parties also agreed upon the following facts:

Report of injury	- October 28, 1997
Employer filed report with State	- November 12, 1997
Last date worked	- May 15, 2002
Claimant's Application for Hearing	- June 3, 2002

ISSUES

The ALJ concluded claimant "met with personal injury by accident arising out of and in the course of her employment with respondent beginning in 1993 and continuing through May 16, 2002"[1], her last date of work for respondent. Going on, the ALJ explained that she was "persuaded by the opinions of Dr. Carro and Dr. Koprivica and finds that there is a causal relationship between claimant's physical condition and her occupational exposure in habitating [sic] the work place building with mold exposure for so many years."[2]

The respondent and both its carriers request review of this Award alleging a variety of arguments.[3] First, they contend exposure to toxic mold is not compensable under the Workers Compensation Act (Act) as either an accidental injury or as an occupational disease.[4] Second, they argue that even assuming claimant's claim is considered an accidental injury occurring by accident, her claim is barred as she failed to timely file a written claim as required by K.S.A. 44-534(b). This argument is based on the contention that claimant's date of accident was October 18, 1997, the last date she was exposed to the mold she asserts is the source of her polymyositis. Third, they maintain the most credible medical evidence indicates the cause of claimant's polymyositis is not mold exposure.

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[1] ALJ Award (Feb. 9, 2006) at 3.

[2] *Id.*

[3] Because the ALJ concluded claimant sustained a series of injuries culminating on May 16, 2002, a date within Liberty's coverage period, Liberty is in the forefront on this appeal. Sunalliance adopts the arguments advanced by Liberty.

[4] Respondent's brief/letter to the Board dated May 22, 2006, citing *Walker* v. Via Christi Health System, Docket No. 242,959.

Claimant argues that Kansas case law supports her claim that mold exposure while at work constitutes an accidental injury under the Act and if it does not, such a conclusion violates her Constitutional rights. Next, claimant argues claimant's accidental injury was the result of repetitive and ongoing exposures continuing up to the date she last worked, May 15, 2002. Claimant maintains her accident date was May 16, 2002, as found by the ALJ, and therefore her claim was filed in a timely fashion. Moreover, even if the accident date is determined to be October 18, 1997, respondent should be equitably estopped from asserting such a defense because respondent represented that she would be "taken care of by Via Christi" and otherwise acted in a "deceitful" manner.[5] Finally, claimant contends the medical testimony supports her contention that her polymyositis was caused by claimant's exposure to mold within the respondent's medical facility.

The following issues are to be addressed in this appeal:

1. Did the claimant sustain a personal injury by accident?

2. What is the date of that accident for purposes of the Act?

3. Did the claimant provide timely written claim as required by K.S.A. 44-520a?

4. Did the claimant file a timely Application for Hearing as required by K.S.A. 44-534(b)? and

5. Should respondent be equitably estopped from asserting a timely claim defense?

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

1. In 1993 claimant began working in the respondent's medical clinic in Mulvane, Kansas. Within months of beginning her employment, claimant noticed there was water leakage in the building where she worked. She would notice spots on the wallpaper and some blackish gray discoloration.[6] The building smelled moldy and musty.[7] At one point,

[5] Claimant's Brief at 3 (filed Jun. 6, 2006).

[6] R.H. Trans. at 11.

[7] *Id.* at 15.

claimant took her husband into the drug closet and showed him what he scribed as a black, blotchy and smelly area of mold.[8]

2. From 1993 to 1997, claimant maintains that she had respiratory problems, fatigue and migraine headaches.[9]

3. On October 10, 1997, a meeting was called and claimant as well as the other employees assigned to this building were advised the building was to be closed. The employees were to be moved to another building. Claimant knew this closure was due to the water damage.

4. In connection with this meeting, claimant completed a form entitled "Employee's Report of Injury/Employee Health Center Authorization" which were, by the terms of the document "To Be Used For On-The-Job Injuries Only".[10] This form contains a listing of claimant's physical complaints including headaches, sneezing, itching, watery eyes, feeling of throat swelling shut, happening within 1 hour of being in the building, worse on rainy days, better when out of building.

5. At this same meeting, another employee, Generva Walker, asked if the employees needed a lawyer. According to claimant and Ms. Walker, they were told they did not need a lawyer, that they would "be taken care of".[11] The employees were also asked to provide blood samples although claimant was never given those test results.

6. While the employees were relocated to another building, the facility in Mulvane was the subject of a remediation project. Before the project began, the building was investigated by Constance Timmons, an industrial hygienist with Integrated Solutions.

7. Ms. Timmons first entered the Mulvane facility on September 18, 1997, observing the areas with water damage and taking various wipe samples in an effort to determine what, if any, substances were within the building. According to Ms. Timmons, while there was little mold on exposed surfaces, the Mulvane building's wall cavities were "severely contaminated."[12]

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[8] Tom Rains Depo. at 9.

[9] R.H. Trans. at 13

[10] *Id.*, Cl. Ex. 1.

[11] Walker Depo. at 5-6; R.H. Trans. at 17-18.

[12] Timmons Depo. at 46.

8. Ms. Timmons noted that there had been an earlier attempt to address the water damage within this building. In particular, she found some paper coated fiberglass insulation that was laying on the floor. This piece of insulation was not removed following the earlier remediation attempt. She sampled this piece of insulation and found Stachybotrys atra, a fungi that can occur with water damage.[13] Upon a positive finding of Stachybotrys atra, Ms. Timmons recommended that access to the area containing the fiberglass be restricted. In addition to Stachybotrys atra, several species of Aspergillus molds were cultured from the samples taken from the Mulvane facility.

9. Based upon Ms. Timmons' investigation and sampling findings, it was determined that the building would have to be cleansed in order to rid the building of the mold. Another individual, Gerard L. Baril, was hired to develop a remediation plan. Ms. Timmons was to oversee and implement this plan and the project which began in October 1997 after the employees were relocated.

10. The pictures taken by Ms. Timmons during the course of this project show that the building indeed was contaminated with a black substance. The building was stripped of its interior although the pictures do not indicate whether the roof was replaced or repaired in any manner.[14]

11. During the course of the remediation, there was apparently a breach of the containment. In February 1997, Ms. Timmons conducted some follow-up air sampling and found higher levels of Aspergillus versicolor and Aspergillus flavus inside the facility as compared to outside. She concluded that this spike in the levels was due to hammering on the joists during the remediation project, which knocked loose dust and debris from inside the attic space. Thus, the "final wipedown" would be critical in her view and would likely resolve any residual contamination.

12. On March 17, 1998, Ms. Timmons conducted post remediation sampling and air monitoring of the building. She documented fungal levels at acceptable limits, but she found Stachybotrys and Aspergillus versicolor spores in some swipe samples. Ms. Timmons recommended respondent have the building cleaned again. This was apparently done.

13. On April 1, 1998, air monitoring and sampling was once again done under Ms. Timmons' supervision. This effort yielded 4 air quality reports each of which determined the air within the building was within acceptable limits.

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[13] *Id.* at 23, 28.

[14] *Id.*, Ex. A-B.

14. The employees, including claimant, were returned to the Mulvane facility in April or May, 1998.

15. Claimant testified that after the 1998 remediation, the water problem continued. She continued to see water coming in from the ceiling.[15] Claimant and a co-worker, Cathi Humboldt, both had to clean up the water-soaked ceiling tiles. According to claimant, the moldy and musty smell continued.[16]

16. Ms. Timmons was last in this building in 2002. She was retained to perform field monitoring and "potential microbial contamination in the clinic. Employees have noted water intrusion through roof leaks recently."[17] Ms. Timmons performed both culturable and non-culturable samplings. Based upon this investigation, she found "[a]ll of the non-culturable samples were well below outdoor levels."[18] While she noted a small amount of fibrous glass was present in the north hallway sample, she went on to say that it does not necessarily indicate a problem. Ms. Timmons recommended the air handler filters or duct liners be examined for damage to ensure they are not shedding.[19] As of this last visit, there was no toxic mold found within the building.[20] She did, nonetheless, recommend respondent be vigilant about inspecting the building in the north hallway and to consider further monitoring during seasonable changes.

Upon cross examination, Ms. Timmons acknowledged that Stachybotrys is one of the more difficult molds to culture and it requires a special media to culture and grow. In the instance of the Mulvane facility, she returned to do post-remediation testing in light of additional complaints of water infiltration. According to Ms. Timmons, she was unable to perform any culture tests on the ceiling tiles to see if they contained either Stachybotrys or Aspergillus because there were no damaged ceiling tiles present. Apparently, those damaged tiles had been removed.[21] Nonetheless, when Ms. Timmons returned to the Mulvane facility she utilized a different protocol than was used before remediation. And using that additional protocol, she had no findings of toxic mold as of 2002.[22]

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[15] R.H. Trans. at 23-24.

[16] *Id.* at 25.

[17] R.H. Trans., Cl. Ex. 4 at 1 (Letter to Larry Hickerson dated March 21, 2002).

[18] *Id.* at 2 of letter

[19] *Id.*

[20] Timmons Depo. at 54-56.

[21] *Id*. at 55-64.

[22] *Id*. at 67.

17. Claimant's health complaints continued, but she worked at the Mulvane facility until May 16, 2002, when she voluntarily quit.

18. Claimant's treating physician, Dr. Antonio L. Carro, who was also a physician working at the Mulvane facility, advised her to leave her job given her constellation of symptoms. Dr. Carro believes claimant's condition, polymyositis, is in direct relationship to her exposure to the building and the mold contained within it.[23] Stated another way, he testified that it was the risk of exposure in respondent's building that caused her greater risk and gave rise to her condition.[24]

19. In May 2003, claimant was seen by P. Brent Koprivica, a physician who routinely performs medical/legal examinations. According to Dr. Koprivica, claimant was in such a weakened condition that he was essentially unable to conduct a normal physical examination.[25]

20. He concluded claimant's polymyositis was caused by cumulative mold exposure while she worked in respondent's facility. His opinion is based upon the sampling that was done in the building, the literature which suggests there is a connection between mold exposure and immune system problems, the fact that there is a cluster of reports from employees in this building, the time of exposure and lastly, the temporal relationship between claimant's exposure and her resulting illness.

21. Upon cross examination, Dr. Koprivica's basis for his opinion were challenged. While Dr. Koprivica was advised that no toxic mold had been found through sampling in the Mulvane building since 1997, he explained that he had assumed she had continued to have exposure up to 2002 based upon Ms. Timmons' report from 2002, after remediation. That report, however, reflects mold spores were found but they were not Stachybotrys spores. He further conceded that while he believed there was a cluster of employees with problems associated with this building, he could only identify one other individual, Generva Walker.[26] And while he maintained the time of her exposure lends credence to his opinion that there is a connection between the building and her symptoms, he could not testify as to when the mold exposure began.[27]

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[23] Carro Depo. at 17-18.

[24] *Id.* at 18.

[25] Koprivica Depo. at 26.

[26] Ms. Walker's workers compensation claim has previously been adjudicated. Docket No. 242,959, 2002 WL 31103958 (Kan. WCAB Oct. 30, 2002).

[27] Koprivica Depo. at 36-37.

22. Dr. Koprivica also testified that based upon the lack of evidence of toxic mold within the Mulvane facility, claimant's last exposure was in 1997.[28]

23. Dr. Koprivica agreed that the literature does not suggest polymyositis is caused by Stachybotrys and that the literature also indicates that the presence of fungi does not equate to illness.[29] He admitted that he has no specialized training regarding the location and diagnosis of molds.[30]

24. Claimant has been receiving treatment from Dr. Timothy S. Shaver, a Board Certified Rheumatologist, who served a 2 year fellowship in allergy, immunology, and rheumatology and is published on the issue of autoimmune disorders in the Journal of Rheumatology. Dr. Shaver testified that claimant's polymyositis is a condition whereby the immune system attacks the muscles and his opinion, this disease process is not the result of mold exposure.[31]

CONCLUSIONS OF LAW

There is no dispute that claimant is presently suffering from the rather significant effects of polymyositis, an autoimmune disease. She is, by the parties' agreement, permanently and totally disabled under the Act. The difficulty comes in the question relating to the nature of her disease process to her work activities, whether it constitutes an accident under the Act and if so, when the accident is deemed to have occurred.

When injuries are clearly manifested from the moment they occur, the trier of fact in a workers compensation claim generally has no difficulty determining if or when an employee suffered from an accident. But often times when, as here, the claimant alleges a series of exposures resulting in personal injury by accident, the decision of whether claimant suffers from an *injury* rather than a *disease* is not so clear cut.[32]

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[28] *Id.* at 31.

[29] *Id.* at 32.

[30] *Id.* at 23-24.

[31] Shaver Depo. at 20-22.

[32] It is worth noting that this claim was tried expressly and exclusively as an accidental injury occurring over a series of dates and culminating on May 16, 2002. Presumably, this is because one of claimant's co-workers asserted a claim against this same respondent on the theory that she suffered an occupational disease. In the *Walker* case the claimant was not awarded benefits as the Board concluded *under those facts* that her disability from the mold exposure was not compensable under the Workers Compensation Act as either an accidental injury or as an occupational disease. See *Walker vs. Via Christi Health System*, Docket No. 242,959, 2002 WL 31103958 (Kan. WCAB Oct. 30, 2002).

The Act provides for the payment of benefits when a worker sustains personal injury by accident arising out of and in the course of employment.[33]

K.S.A. 1997 Supp. 44-508(d) defines "accident":

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 1997 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

While there are some Kansas cases involving mold exposure in the workers compensation area of the law, it is somewhat unclear when exposure to a potentially toxic substance should be treated as an accident or when it constitutes a disease. The Court of Appeals recently recognized the hybrid nature of these sorts of claims in *Casey*[34]. In that case, a grocery store worker alleged an allergy to the molds that naturally occurred on the fruits and vegetables in the store. The *Casey* Court noted that "[s]ome compensable injuries under the Kansas Workers Compensation Act are hybrid conditions that have some elements of a work-related injury and some elements of an occupational disease."[35] The distinction is one that turns upon the evidence put forth in each case. And that decision, in turn, dictates the appropriate date of accident determination and whether there has been a timely assertion of the claim under the appropriate statutes of limitation.

Under these facts, this first determination is rather easy as claimant has pled and tried this matter as one involving a series of accidental injuries and *not* as an occupational disease. And there is no dispute that she has sustained an injury that was accidental.

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[33] K.S.A. 1997 Supp. 44-501(a).

[34] *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66 (2005).

[35] *Id.*, Syl ¶ 1.

While it is true that the mold exposure she experienced[36] occurred on more than one date and over a period of time rather than in one, acute onset, such repetitive exposures are recognized under our law.[37]

Having concluded that claimant established that she sustained an accidental injury, the Board must then determine the appropriate date of accident. Following creation of the bright line rule in the 1994 *Berry*[38] decision, the appellate courts have grappled with determining the date of accident for repetitive trauma injuries. In *Treaster*,[39] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive or micro-traumas (which we have concluded daily mold exposure is analogous to) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. The focus of the analysis in *Treaster* is on the date that the injured worker is last exposed to the offending work activity that caused the worker's injury. That date then establishes the date of injury.

The ALJ concluded claimant suffered a series of exposures over her entire period of employment ending on May 16, 2002. As noted in the facts above, respondent undertook a large remediation project on this building beginning October 18, 1997. Post remediation sampling was conducted and according to the industrial hygienist, the building was free of toxic mold as of April 1, 1998. Thus, respondent contends that while claimant returned to that building in 1998 and continued to work there until 2002, she did not suffer additional mold exposures. Claimant has testified that the water leakage continued after the remediation project as did the moldy and musty smell. Thus, she contends she continued to suffer exposures and it was not until May 16, 2002 when she quit her job that the exposures ceased and the accident then accrued.

The Board has considered the evidence as a whole and concludes that claimant's last date of exposure was October 18, 1997, the date the building was evacuated for the remediation project. The Board is mindful of claimant's testimony that she continued to observe water stains on the ceiling tiles within the building after 1997. However, those ceiling tiles were not tested. And the tests that were done within the building by the industrial hygienist in 1998 and again in 2002 indicate there were no toxic molds within that

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[36] The Board is mindful of respondent and its carriers' argument that the exposure ceased as of October 1997 when the employees were removed from the building and remediation began. And this reference is only as to the period before that event. There is no dispute that claimant was exposed to toxic mold in the Mulvane building at least up to October 18, 1997.

[37] *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66 (2005).

[38] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[39] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

facility. Admittedly, claimant points out that the post-remediation testing may well have been insufficient as it did not include cultures from ceiling tiles that were damaged sometime after the remediation project. Nonetheless, the Board cannot speculate based upon evidence it does not have. For these reasons, the Board concludes that claimant's last exposure was October 18, 1997, and that date is her date of accident for purposes of the Act.

Having determined the date of accident, the Board can now consider whether timely written claim was given and the Application for Hearing filed as required by statute. The written claim statute, K.S.A. 44-520a (1993 Furse), provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

There is no dispute that on October 10, 1997, at a meeting called by respondent's representatives, claimant was asked to complete a report of injury. This document specifically lists exposure to mold on walls as the source of her injury. Claimant testified that she believed this document satisfied her need to file a workers compensation claim.[40] Based upon this uncontroverted evidence the Board finds that claimant provided timely written claim as required by K.S.A. 44-520a (2003 Furse). The fact that her written claim was given before her legally determined date of accident is of no consequence.[41]

The more problematic aspect of this claim involves the Application for Hearing. K.S.A. 1997 Supp. 44-534(b) provides that:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later.

In this case, no application for hearing was filed until June 3, 2002, a date nearly 4-1/2 years after October 18, 1997, her last date of exposure. No compensation has been

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[40] R.H. Trans. at 26-28; Ex. 1 and 3.

[41] *Remmell v. Boeing Co.-Wichita*, Docket No. 81,693 (Kansas Court of Appeals unpublished opinion filed July 30, 1999).

paid in this matter so, by statute, the latest date she could have filed a timely application for hearing was October 18, 2000, three years after her date of accident. In claimant's report of injury which she completed for respondent in October 1997, she listed October 1997 as her accident date. Respondent in turn filed a report of injury with the Division of Workers Compensation in November 1997.

While claimant argues that her exposure continued past October 1997 and into 2002, up to her last date of work, the Board has concluded that the remediation of the Mulvane building was complete and that no further toxic mold was documented past October 18, 1997, the last date claimant was within the building. Thus, claimant failed to file a timely application for hearing as required by K.S.A. 44-534(b). And by virtue of the terms of the statute, claimant's claim must fail.

The Board also finds that estoppel does not defeat respondent's affirmative defense. The Board notes that the doctrine of equitable estoppel is applicable to workers compensation proceedings.[42] However, one who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement.[43] Here, there is no evidence that the claimant relied upon respondent's alleged misleading statements during the October 1997 meeting. To the contrary, she testified that she filled out a form and considered that her workers compensation claim. While that document satisfied the written claim statute, it does not satisfy the requirements of K.S.A. 44-534(b), and there is no other evidence to suggest a change in position on claimant's part. In fact, another employee hired a lawyer and pursued a workers compensation claim. Yet, claimant did nothing until June 3, 2002 when she filed her application for hearing. The Board finds the doctrine of estoppel does not apply in this instance.

To summarize, the Board finds that while claimant has established she suffered a series of accidents arising out of and in the course of her employment with respondent, that accident is deemed to have occurred as of October 18, 1997, the last date she was exposed to toxic mold in her workplace. The Board further finds the greater weight of the evidence establishes that after the remediation project in 1997-98, claimant was not again exposed to toxic mold. Thus, her application for hearing which was filed June 3, 2002, 4-1/2 years after her date of accident, was not filed in a timely manner. The ALJ's Award must therefore be reversed and claimant's claim is denied.

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[42] *PMA Group v. Trotter*, ___ Kan. ___, 135 P.3d 1244 (2006).

[43] *Id*.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 9, 2006, is reversed and the Board denies claimant's request for benefits.

The Board adopts the orders set forth in the Award regarding the payment of the administrative costs.

IT IS SO ORDERED.

Dated this _____ day of July, 2006.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and Liberty Mutual
Joseph McMillan, Attorney for Respondent and Royal & Sunalliance
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director